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Comptroller General
of the United States
Washington, D.C. 20548

REDACTED VERSION*

Decision

Matter of: Speedy Food Service, Inc.

File: B-258537.3; B-258537.5

Date: May 2, 1995

Theodore M. Bailey, Esq., for the protester.
Matthew S. Perlman, Esq., and Craig King, Esq., Arent, Fox,
Kintner, Plotkin & Kahn, for Pentad Corporation, an
interested party.
Vera Meza, Esq., and Charmaine E. Betty-Singleton, Esq.,
Department of the Army, for the agency.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Protest that agency failed to hold meaningful discussions with protester regarding its staffing level is denied where record demonstrates that agency provided protester with specific questions regarding staffing level.
2. Protest that agency failed to evaluate protester's price proposal in accordance with the solicitation is denied where agency reasonably determined based on protester's low proposed staffing in comparison with the government estimate that protester did not understand the requirements of the solicitation.
3. Protest that agency failed to perform a proper best value analysis and determined that small business protester was nonresponsible without referral to the Small Business Administration for consideration under Certificate of Competency procedures is dismissed as untimely where protester learned these bases of protest from agency report but did not file protest within 10 working days after it received the report.

DECISION

Speedy Food Service, Inc. protests the award of a contract to Pentad Corporation under request for proposals (RFP)

*The decision issued on May 2, 1995, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions are indicated by "[deleted]."

No. DAAG60-94-R-0017, issued by the Department of the Army for mess attendant services at the United States Military Academy at West Point. Speedy asserts that the Army did not hold meaningful discussions with Speedy; failed to evaluate Speedy's price proposal in accordance with the solicitation; did not perform a proper price/technical tradeoff; and improperly failed to make a referral to the Small Business Administration (SBA) for consideration under Certificate of Competency (COC) procedures after determining that Speedy was nonresponsive.

We deny the protest in part and dismiss it in part.

BACKGROUND

The solicitation, issued on July 29, 1994, as a small disadvantaged business set-aside, contemplated award of a fixed-price requirements contract. The solicitation provided that proposals would be evaluated under the following criteria, listed in descending order of importance: management and staffing; quality control; and cost. The solicitation also listed subfactors for each of the evaluation factors. The relevant subfactors for this protest are organizational chart/staffing under the management and staffing factor, and cost proposal and cost realism under the cost factor.

The evaluation plan for the solicitation called for a source selection evaluation board (SSEB) to evaluate proposals and prepare discussion questions, and a source selection advisory council (SSAC) to oversee and advise the SSEB and to advise the source selection authority (SSA), who was responsible for making the final award determination. The award was to be made to the offeror whose proposal presented the best value to the government based on an integrated assessment of the evaluation factors.

The Army received 11 proposals, which then were evaluated by the SSEB. On November 9, oral discussions were held with the offerors based on questions the SSEB developed while it was evaluating the proposals. After the oral discussions, seven offerors, including the protester, were provided with written discussion questions developed by the SSEB, and were asked to submit best and final offers (BAFO). The SSEB evaluated the BAFOs by awarding point scores to the proposals under each technical factor and subfactor, and by assigning adjectival ratings--exceptional, good, acceptable,

¹ Although the Army and the protester refer to the analysis as a cost realism evaluation, since the solicitation contemplated the award of a fixed-price contract, the proper terminology is price realism.

marginal, poor or unacceptable--to the proposals under all the factors and subfactors, including price. The SSEB also provided its assessment of the probability of successful performance presented by the proposal under each subfactor.

In evaluating Speedy's BAFO, the SSEB assigned the proposal a rating of [deleted] for each subfactor under the management and staffing factor and an overall rating of [deleted] for the factor. However, the SSEB noted, among other things, that Speedy's proposed staffing was [deleted] in many areas, and stated that Speedy's staffing narratives and charts were not indicative of a [deleted] of the staffing levels necessary to perform adequately and reflected [deleted] expected probability of success. Regarding price, the SSEB rated Speedy [deleted] based on its determination that Speedy's proposed staffing, which equaled [deleted] percent of the government estimate, was too low to perform the job. The SSAC reviewed the evaluation results and recommended that Pentad be selected for award based on its acceptable rating in all areas, including price.

The SSA reviewed the recommendation of the SSAC, as well as the BAFOs and the SSEB evaluations of the BAFOs. The SSA disagreed with the SSEB that Speedy's proposal should have been rated [deleted] in the management and staffing factor and changed the rating to [deleted] based on his conclusion that the proposal did not [deleted] address staffing levels; was [deleted] regarding staffing ranges; and, coupled with a price proposal of [deleted] compared to a government estimate of [deleted]; indicated a lack of understanding of the operations, problems and objectives of the solicitation. The SSA also found that the price proposal was [deleted] because it was based on staffing that was inadequate to perform the contract and contained no explanations that provided confidence that Speedy could perform at the prices proposed. Overall, he believed that the proposal presented a [deleted] of failure. With respect to Pentad's proposal, the SSA agreed that it was acceptable in all areas, and offered a realistic price. The SSA determined that the proposal submitted by Pentad represented the best value to the government based on these factors and a proposed price that was \$800,000 less than the most highly rated technical proposal. The contract was awarded to Pentad and this protest followed.

ANALYSIS

Discussions

Speedy protests that the agency failed to hold meaningful discussions with the firm. Federal Acquisition Regulation (FAR) § 15.610(c)(2) provides that where discussions are conducted, the agency must at a minimum advise offerors of deficiencies in their proposals so that they are given an opportunity to satisfy the government's requirements. American Dev. Corp., B-251876.4, July 12, 1993, 93-2 CPD ¶ 49. For discussions to be meaningful, the agency is required to point out weaknesses, excesses, or deficiencies in proposals unless doing so would result in technical transgression or technical leveling. Id. Speedy points out that the determining factor in the Army's decision to eliminate Speedy's proposal from consideration for award was its conclusion that Speedy did not propose an [deleted] staff to perform the contract. Speedy asserts that during discussions the Army did not discuss this matter with Speedy and therefore failed in its obligation to hold meaningful discussions.

Our review of the protest record shows that when the SSEB reviewed Speedy's initial proposal it concluded that Speedy did not propose an [deleted] staff to perform the contract and it included the following two questions on its list of discussion questions for Speedy:

"[Deleted]."

These questions directly addressed the agency's concerns with Speedy's proposed staffing levels. While Speedy points to a memorandum of the oral discussions held with Speedy on November 9 to demonstrate that these questions were not asked, the Army asserts that the list of written questions prepared by the SSEB, including the two questions concerned with staffing, in fact were provided to Speedy.

The protest record confirms that Speedy was provided with notice of the Army's concern with its staffing, including these specific questions. Specifically, in a November 18 letter to the contracting agency, Speedy stated:

" Our Best and Final Offer was forwarded under separate package. As part of our proposal we addressed those areas you identified as points of discussion or areas of deficiencies. To assist you in locating our responses to your comments, the following is provided:

.

"Part III- Cost Proposal

"[Deleted]."

This letter indicates that Speedy was aware not only of the agency's general concerns about its proposed staffing, but also of the specific discussion questions prepared by the SSEB in this area. Thus, the record clearly demonstrates that the Army did in fact hold meaningful discussions with Speedy regarding its staffing levels.

Price Evaluation

Speedy protests that the Army did not evaluate its price proposal in accordance with the solicitation. Speedy argues that the Army did not evaluate Speedy's ability to perform at its proposed price or consider that the price was based on the same staffing that was considered acceptable under the management/staffing evaluation factor. Instead, Speedy asserts, the agency ignored the evaluation criteria stated in the solicitation and found Speedy's price proposal unacceptable simply by comparing it to the government estimate. Speedy concludes that based on the evaluation factors in the solicitation the Army had no basis to evaluate Speedy's price proposal as [deleted].

We find that the Army properly followed the RFP criteria in determining that Speedy's price proposal was [deleted]. Under the first evaluation subfactor relating to price ("cost proposal"), the RFP specifically stated that the Army was concerned with relating the offeror's understanding of the project and its ability to organize and perform the proposed contract to its proposed costs. While Speedy correctly points out that the second price evaluation subfactor ("cost realism") stated that the Army would evaluate the realism of the proposed price in relation to the offeror's specific technical approach, that subfactor also states:

"Any inconsistency, whether real or apparent, between promised performance and cost should be explained in the

²In the comments Speedy submitted in response to the agency report, Speedy also disputed additional deficiencies the agency mentioned, arguing that they are nonexistent, minor or areas which were not discussed with Speedy. As Speedy recognizes, however, the SSA's reason for finding Speedy's proposal unacceptable was its [deleted] proposed staffing. We therefore have not discussed these other areas.

proposal. Any significant inconsistency, if unexplained, raises a fundamental question of the offeror's understanding of the nature and scope of the work required"

Thus, the solicitation made clear that in assessing price proposals, the Army was concerned with whether the offeror understood the requirements of the solicitation.

Consistent with these criteria, the Army examined whether Speedy's price proposal reflected an understanding of the government's requirements. The agency determined that Speedy did not understand the requirements of the contract because its proposed price--reflecting its [deleted] staffing level--was too low. While Speedy asserts that in reaching this conclusion the Army improperly failed to consider that Speedy's management/staffing proposal, based on the same proposed staffing, was found [deleted], Speedy ignores the fact that the [deleted] rating was awarded only by the SSEB. When the SSA reviewed the evaluation he determined that the management/staffing proposal should have been rated [deleted] and changed the rating. Source selection officials are not bound by the recommendations of lower-level evaluators, and as a general rule, we will not object to the higher-level official's judgment, absent unreasonable or improper action, even when the official disagrees with an assessment made by a working-level evaluation board or individuals who normally may be expected to have the technical expertise required for such evaluations. Sarasota Measurements & Controls, Inc., B-252406.3, July 15, 1994, 94-2 CPD ¶ 32.

Speedy argues that neither the SSEB nor the SSA considered whether Speedy could perform the contract with its proposed approach based on such things as efficiency, but instead, improperly based the decision solely on a comparison of Speedy's proposal with the government estimate. This argument is not persuasive. The SSA specifically stated in his assessment of Speedy's proposal that there was no explanation in the proposal of how Speedy could perform at

³To the extent Speedy argues that under the "cost realism" subfactor the Army was required to evaluate whether Speedy accurately priced its technical proposal, where the award of a fixed-price contract is contemplated, cost realism in this sense need not be considered since a fixed-price contract provides for a definite price and places upon the contractor the risk and responsibility for all contract costs and resulting profit or loss. See Crestmont Cleaning Serv. & Supply Co., Inc.; et al., B-254486; et al., Dec. 22, 1993, 93-2 CPD ¶ 336.

its low cost. This was despite the fact that, as noted above, during discussions Speedy was put on notice of the agency's concern with its proposed level of staffing. Nor has Speedy provided any explanation in its protest of what unique approach or efficiencies it offered in its proposal that would allow it to perform with its proposed staffing; rather, Speedy generally argues that a company might be able to perform for less because of a unique approach or efficiencies it has developed.

Further, other than its general objection to the agency's reliance on the government estimate in evaluating its proposal, Speedy raises no specific challenge to the accuracy of the government estimate. The agency explained that the government estimate was calculated based on a review of the fiscal year 1993 and part of the fiscal year 1994 years of performance of the services at issue here, and in the absence of any challenge to its reliability, we see no basis to object to the agency's use of the estimate as a measure of Speedy's understanding and ability to meet the government's requirements. See Range Technical Servs., 68 Comp. Gen. 81 (1988), 88-2 CPD ¶ 474; Intelcom Support Servs., Inc., B-222547, Aug. 1, 1986, 86-2 CPD ¶ 135. Accordingly, given the lack of information in Speedy's proposal demonstrating that Speedy could perform the contract with its proposed staffing, we have no basis to question the SSA's decision to lower Speedy's rating on the management/staffing proposal to unacceptable, or to find Speedy's price proposal unacceptable, after determining that Speedy did not understand the requirements of the solicitation based on a comparison of Speedy's proposed price and staffing level with the government estimate.

Other Issues

On February 28, 1995, Speedy filed its comments on the agency report. In those comments Speedy argued for the first time that the agency did not perform a proper best value analysis and that the agency's decision to reject Speedy's proposal based on price was a nonresponsibility determination that the agency was required to refer to the SBA under its COC procedures. Our Bid Protest Regulations require that protests not based upon alleged improprieties in a solicitation be filed no later than 10 working days after the protester knew or should have known the basis of protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2)

⁴In this regard, we note that while the SSEB rated Speedy's proposal [deleted] under the management and staffing factor, this rating was based on a number of considerations in addition to staffing. The SSEB did specifically conclude that Speedy's proposed staffing was too low.

(1995). When a protester supplements a timely protest with new and independent protest grounds, the later raised issues must independently satisfy our timeliness requirements. Renow, Inc., B-251055, Mar. 5, 1993, 93-1 CPD ¶ 210. Here, Speedy's protest regarding the best value analysis and the alleged nonresponsibility determination were based on the agency report, which Speedy states it received on February 10; Speedy was therefore required to raise these issues no later than February 27, 10 working days later. Arthur D. Little, Inc., B-243450.3, June 19, 1991, 91-1 CPD ¶ 583. Since Speedy did not raise them until February 28, they are untimely and will not be considered.

The protest is denied in part and dismissed in part.

Robert P. Murphy
General Counsel

B-258537.3; B-258537.5

The Honorable Kay Bailey Hutchison
United States Senator
961 Federal Building
300 E. 8th Street
Austin, TX 78701

Dear Senator Hutchison:

This is in response to your letter dated January 27, 1995, concerning a protest by Speedy Food Service, Inc. challenging the award of a contract to Pentad Corporation under request for proposals No. DAAG60-94-R-0017, issued by the Department of the Army for mess attendant services at the United States Military Academy at West Point.

By decision of today, we denied the protest in part and dismissed it in part. We are unable to send you a copy of the decision at this time because information contained therein is subject to the terms of a protective order issued by our Office. We are in the process of preparing a version for public distribution and will furnish a copy to you as soon as it is available.

Sincerely yours,

Robert P. Murphy
General Counsel